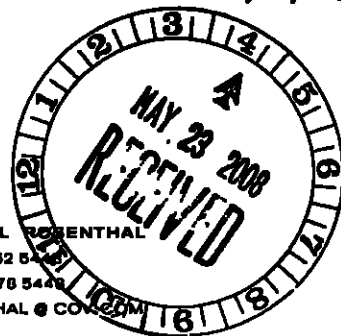


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May 23, 2008

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## **BY HAND**

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-00001

Re Docket No. 42105. Dairyland Power Cooperative v Union Pacific  
Railroad Company

Dear Secretary Quinlan

On May 22, 2008, Dairyland Power Cooperative ("Dairyland") submitted a letter that relied on selective use of quotations to mischaracterize the Board's holding in STB Ex Parte No. 661, *Rail Fuel Surcharges* (STB served January 26, 2008).

Contrary to Dairyland's claim, the Board did not hold that a shipper could bring an unreasonable practice complaint based on allegations that a carrier collected fuel surcharges that exceed "the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." See Letter from John H. LeSeur, Esq., to Hon. Anne K. Quinlan, dated May 22, 2008, p. 2. To the contrary, the Board recognized that requiring carriers to construct fuel surcharge programs that incorporate every factor that affects fuel consumption "would be impractical." Decision at 9. Thus, the Board held that "if a carrier chooses to use a fuel surcharge program, it must be based on attributes of a movement that directly affect the amount of fuel consumed." *Id.* "In other words," the Board said, "there must be a reasonable nexus to fuel consumption." *Id.* The Board also indicated that a rail carrier's use of a mileage-based surcharge would satisfy the reasonable nexus standard because "[m]ileage is one of the primary factors that affects fuel consumption." *Id.*

Dairyland does not dispute that Union Pacific adopted and applied a mileage-based surcharge program in compliance with the Decision. Instead, it seeks to hold Union Pacific to a standard of precision that the Board recognized "would be impractical." *Id.*

The Honorable Anne K. Quinlan  
May 23, 2008  
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Dairyland mischaracterizes the Board's Decision by combining selected parts of two sentences in which the Board was explaining its conclusion that the use of rate-based surcharges in the future would be considered an unreasonable practice. In the first sentence, the Board explained why it had concluded that "a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the fuel surcharge is applied, cannot fairly be described as merely a cost recovery mechanism." *Id.* at 6. The full sentence from which Dairyland selectively quotes reads: "Rather a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *Id.*

In the second sentence, the Board addressed BNSF Railway's argument that "Congress could not have intended for [the Board] to regulate an individual component of a rate based solely upon the label given to it by the railroad as a fuel surcharge." *Id.* at 7. The Board said: "Congress exempted rail carriers from the consumer protection requirements of the Federal Trade Commission Act, presumably not because Congress intended to permit carriers to mislead their customers, but because our authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers." *Id.*

Dairyland combines a few words from each sentence to construct a holding that does not appear in the Decision. The Board did not say that a fuel surcharge program that has a reasonable nexus to fuel consumption, such as a mileage-based program, constitutes an unreasonable practice unless it precisely reflects the actual incremental increase in fuel costs for each movement. To the contrary, as discussed above, the Board expressly recognized that the standard advocated by Dairyland would be "impractical." *Id.* at 9.

Moreover, as explained in Union Pacific's Motion to Dismiss, the Board may not use its unreasonable practice jurisdiction to entertain shippers' claims that they are being overcharged, regardless of whether the shippers are challenging the total line-haul rate or a separately challengeable charge for a distinct service.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal".

Michael L. Rosenthal

cc John H. LeSeur, Esq. (Counsel for Dairyland)